(1)

Supreme Court, U.S.
FILED

96 261 JUL 9 1996

OFFICE OF THE CLERK

No. _____

In The Supreme Court of the United States

October Term 1995

ARMINTA S. LOWERY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition For Writ of Certiorari to the
Court of Appeals of Virginia

PETITION FOR A WRIT OF CERTIORARI

Arminta S. Lowery
P.O. Box 241
South Boston, Virginia 24592
(804) 572-8425
Pro Se

21 pp

QUESTION PRESENTED

Was the evidence sufficient at law to prove beyond a reasonable doubt that Defendant intentionally refused to take blood or breath test and assaulted and battered a police officer?

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Petition for Appeal 1

Nature of Case and Material Proceedings Below 2

Statement of Facts 3

Assignment of Error 7

Law, Argument and Authority 7

Conclusion 11

Certificate of Service 11

Appendix: A-1

TABLE OF AUTHORITIES

Virginia Cases Cited:

Burrows v. Commonwealth, 224 Va. 317, 295 S.E.2d 893 (1982) 6

Corbett v. Commonwealth, 210 Va. 304, 171 S.E.2d 251 (1969) 6

Covington v. Commonwealth, 136 Va. 666665, 1166 S.E.2d 462 (1923) 6

Maynard v. Commonwealth, 10 Va. App. 15, 389 S.E.2d 910 (1990) 7

McGhee v. Commonwealth, 219 Va. 560, 248 S.E.2d 808 (1978) 6

Other Case Cited:

State v. Bailey, 151 W.Va. 796, 155 S.E.2d 850 (1967) 6

IN THE
SUPREME COURT
OF THE UNITED STATES

ARMINTA S. LOWERY, Appellant,

v. COA RECORD NO. 1544-95-2

COMMONWEALTH OF VIRGINIA, Appellee.

PETITION FOR APPEAL

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW your Appellant, Arminta S. Lowery (hereinafter "Defendant"), by her counsel, and avers that she is aggrieved of the December 28, 1995 denial by the Court of Appeals of Virginia of a certain judgment of the Halifax County Circuit Court rendered July 11, 1995 by the Honorable William L. Wellons, Judge. The judgment consists of finding of guilty to charges of refusal to take a blood or breath test, with its attendant sentence of a six-month loss of her privilege to drive on the highways of Virginia, and of assault and batter of police officer with its attendant sentence of six months in jail with all but one weekend suspended, a $500.00 fine with $300.00 suspended, on the condition of good behavior, and 100 hours of

community service to be performed through the Community Diversion Incentive Program.

NATURE OF CASE AND MATERIAL PROCEEDINGS BELOW

On November 11, 1994, Defendant's vehicle was stopped in Halifax County by South Boston Police Officer Richard Pulliam in the course of his duty. Suspecting Defendant of possible DUI he had her blow into the alcosensor twice at a 15-minute interval, and had her attempt some field tests. Based on her performance he attempted to arrest her for DUI and recited the complied consent law to her. However, she became combative and verbally and physically abusive. As a result, Pulliam charged her with refusal to take the blood or breath test and with curse and abuse.

The Commonwealth amended the curse and abuse warrant to charge her instead with assault charges in the District Court and appealed both verdicts to the Circuit Court.

At her trial de novo on July 11, 1995, she pled not guilty to both charges, however, she was found guilty of both. She was sentenced on the refusal charge to a six-month loss of her operator's permit, on the assault she was sentenced to six months in jail with all

but a weekend suspended, a $500.00 fine with $300.00 suspended, and 100 hours of community service through the CDI Program.

Defendant timely noted her appeal to the judgments of the Court. By Order dated December 28, 1995, the Court of Appeals of Virginia affirmed the assault conviction and transferred the appeal of the refusal conviction to the Supreme Court of Virginia pursuant to Virginia Code §8.01-677.1.

STATEMENT OF FACTS

While on duty, South Boston police officer Richard Pulliam observed a vehicle driven by Defendant make a wide right turn (Tr. 16). He followed her and noticed that she was driving very slowly (Tr. 16). He pulled over her vehicle to investigate.

Upon checking her for her license and registration he smelled an odor of alcoholic beverage, so he asked had she had anything to drink (Tr. 17). She denied that she had, then said she had consumed "a little champagne, two or three" (Tr. 17).

Pulliam advised her of her rights and administered a preliminary breath test (alcosensor) (Tr. 17), and said, "Well, it don't show up here." (Tr. 46). He told her he wished to repeat the alcosensor in 15 minutes (Tr. 17, 4). Meanwhile, Defendant told him she had just come from a wedding and was heading to buy hamburgers for church the next day (Tr. 4). She testified that she'd been offered some champagne but since she does not drink alcohol she spit it out into a napkin and drank a Coca-Cola instead (Tr. 44, 56).

Fully cooperating with the officer's requests she took the alcosensor a second time, 15 minutes after the first time. In addition, she attempted some field sobriety tests (Tr. 17). She was not able to do the one leg stand nor the walk-and-turn (Tr. 17), but she told the officer that she has acute arthritis which causes her to limp (Tr. 46). After the walk and turn Pulliam told Defendant, "You did good." (Tr. 46).

He had Defendant to sit in her car while he radioed Defendant's identifying information (Tr. 47). When he came back, he told Defendant, "I wasn't going to arrest you, but they are telling me to go ahead on." (Tr. 47).

Up to that point Defendant had been "extremely cooperative" Tr. 25). But when Pulliam wanted to handcuff her she challenged, "For what? I am not drunk." (Tr. 49). As she became more and more belligerent, Pulliam called for assistance (Tr. 18). When Officer Edwins arrived he assisted Pulliam in putting Defendant into the police car where "She was jerking and bucking and cursing us" (Tr. 18). Once placed inside the police car, Defendant was swinging her feet towards Pulliam, who told her not to kick him (Tr. 18).

In route to the Magistrate, Pulliam advised her or her right to remain silent (Tr. 18). However, she continued to curse and verbally abuse him (Tr. 18).

At the Magistrate's office it took six officers to handle her (Tr. 18). She sat down on the road and had to be physically lifted to take her into the jail and up the stairs to the Magistrate (Tr. 65). There one officer, Charles Green smelled alcohol on Defendant's breath (Tr. 70).

Defendant tried to kick the Magistrate (Tr. 70). At one point she would not sit in her chair, and when Officer Pulliam tried to sit her down she kicked him in the shins, tried to bite him, and scratched

him lightly on his hand (Tr. 18, 30, 70). Officer Green then got a set of leg irons which were put on her (Tr. 70). The Magistrate filed a certificate that Defendant refused to take the breathalyzer or blood test and refused to sign the certificate (Commonwealth's Exhibit 2).

Defendant, who was 59 years old, testified she was cooperative with the police until they began twisting her arm and hurting her and dragging her (Tr. 51, 52, 60). She claims she was not struggling with the deputies but that she had told them she had a cramp hurting her leg so she could not walk properly (Tr. 52). She admitted cursing the officers, but denied kicking or biting them (Tr. 50). She accused the officers of robbing her because they took her purse (Tr. 53). She testified one officer even suggested killing her (Tr. 49). And she insisted that she did take the breath test (Tr. 50, 78). She was even asserting this fact when the judge was pronouncing the sentence (Tr. 82).

Defendant's son who lives at home with his mom testified that his mom at times is confused (Tr. 41). From time to time she had problems with her understanding of even simple matters which he had

tried to explain to her (Tr. 41). But she had never had problems with drinking (Tr. 36).

ASSIGNMENT OF ERROR

The evidence was insufficient at law to prove beyond a reasonable doubt that Defendant intentionally refused to take a blood or breath test and assaulted and battered a police officer.

LAW, ARGUMENT AND AUTHORITY

The evidence was insufficient at law to prove beyond a reasonable doubt that Defendant intentionally refused to take a blood or breath test and assaulted and battered a police officer.

In order to find a Defendant guilty in a criminal case, the jury must be convinced of his guilt, by the evidence, beyond a reasonable doubt, for the defendant is entitled to the benefit of any reasonable doubt as to whether or not he has violated the law. Corbett v. Commonwealth, 210 Va. 304, 171 S.E.2d 251 (1969). Where the evidence is all in, if the evidence for both the Commonwealth and the accused, regardless of whether his defense is an alibi, self-defense or what not, leaves a reasonable doubt as to his guilt, the jury must find the prisoner not guilty. Covington v. Commonwealth, 136 Va. 665, 116 S.E.2d 462 (1923).

The Commonwealth must establish the guilt of the accused beyond a reasonable doubt, and this burden continues throughout the trial and never shifts. McGhee v. Commonwealth, 219 Va. 560, 248 S.E.2d 808 (1978). Thus, in order to justify a conviction, every fact necessary to a conviction must be proved beyond a reasonable doubt.

The result of the evidence must not only be consistent with the guilt of the accused, but must exclude every reasonable hypothesis of his innocence. Burrows v. Commonwealth, 224 Va. 317, 295 S.E.2d 893 (1982).

In order for the verdict of guilty to stand, the evidence upon which such verdict is based must exclude every reasonable explanation except of guilty, and it is well-recognized that when two inferences, equally plausible, may be drawn from the evidence, the law does not permit the jury to adopt the one more unfavorable to the accused. State v. Bailey, 151 W.Va. 796, 155 S.E.2d 850 (1967). Whenever the evidence leaves indifferent which of several hypotheses is true, or merely establishes only some finite probability in favor of one hypothesis, such evidence does not amount to proof beyond a

reasonable doubt. Maynard v. Commonwealth, 10 Va. App. 15, 389 S.E.2d 910 (1990).

In the present case, with the evidence all in it does not exclude every reasonable explanation except of guilt, for there is an alternate equally plausible inference that can be drawn from the evidence pertaining to the refusal conviction. That Defendant was so confused that she did not understand that she was being required to take an additional breath test other than the two alcosensor tests she had already taken. There is no evidence in the record that any officer nor the Magistrate ever explained to Defendant the fact that the alcosensor results are not the same as the breathalyzer results and that the law required her to take either a breathalyzer or blood test. In the midst of her anxiety at being placed under arrest the officers understandably took a steadfast posture with her rather than an understanding one. All the way up until the judge pronounced the sentence she still insisted that she had not refused to submit to a breath test and that she had indeed taken two breath tests. She was convicted of unreasonably refusing the blood or breath tests, and it is not unreasonable for a person to refuse a third test after having

complacently submitted to two prior tests if the person does not know that the first two tests do not count since they were not taken on a breathalyzer machine. Nowhere in the testimony is there mention of any effort to explain this to Defendant. The evidence is merely that she was advised of implied consent. Never were any officers asked to specify what this advice entailed.

With regard to the assault charge, Defendant's "confusion" could well account for her inability to realize that she was kicking Officer Pulliam. She readily admits that she panicked, fearful that the officers were going to hurt her. She was like a cat backed into a corner merely attempting to protect herself from misperceived danger.

Given the totality of the evidence it is not sufficient to sustain the guilty verdicts. Accordingly, they should be reversed and the warrants against her dismissed.

CONCLUSION

Wherefore, the Defendant prays this Honorable Court to find insufficient evidence to convict the Defendant of intentionally refusing to take a blood or breath test and assaulting and battering a police officer and to reverse and dismiss these convictions.

ARMINTA S. LOWERY

By: Arminta S. Lowery
Arminta S. Lowery, Pro Se.

Arminta S. Lowery
P.O. Box 241
South Boston, Virginia 24592
(804) 572-8425

NOTARY CERTIFICATE

The foregoing instrument was acknowledged before me this 24th day of July, 1996 by ARMINTA S. LOWERY.

My commission expires: Aug. 31, 1998.

Deborah C. Major
Notary Public

CERTIFICATE OF SERVICE

A true and exact copy of this Petition for Appeal was mailed, postage prepaid, to Honorable John E. Greenbacker, Jr., at the address, Commonwealth's Attorney for Halifax County, P.O. Box 550, Halifax, Virginia 24558, (804) 476-2139, on this the 24th day of July, 1996.

Arminta S. Lowery

Arminta S. Lowery, Pro Se

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 28th day of December, 1995.

Arminta S. Lowery,
Appellant,

against Record No. 1544-95-2
Circuit Court No. CR95000121-OO

Commonwealth of Virginia,
Appellee.

From the Circuit Court of Halifax County
Before Judge Nelson T. Overton

This petition for appeal regarding appellant's conviction for assault and battery has been reviewed pursuant to Code § 17-116.05:2(C) and is denied for the following reason:

"On appeal, we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987)

Officer Pulliam testified that he stopped appellant's car after he saw her operate it erratically. After preliminary field tests, Pulliam advised appellant she was under arrest. He read her the implied consent law from a card issued by the police department. She "refused to take a test, any test." When he tried to arrest her, appellant resisted. Another officer arrived and assisted Pulliam in subduing appellant. At the jail, when the police took appellant to see the magistrate, appellant kicked Pulliam in his shins several times and scratched him.

Charles Greene is a correctional officer and was present when appellant arrived at the jail. Appellant "was very combative" when she arrived. Greene saw appellant kick and scratch Pulliam.

The fact finder believed the Commonwealth's evidence and rejected the evidence of appellant and her son. "The weight which should be given to evidence and whether the testimony of a witness is credible are questions which the fact finder must decide." Bridgeman v. Commonwealth, 3 Va. App. 523, 528, 351 S.E.2d 598, 601 (1986). The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of assault and battery.

As this Court does not have jurisdiction over an appeal from a conviction of refusal to take a blood/breath test, this appeal is transferred to the Supreme Court of Virginia, pursuant to Code § 8.01-677.1, insofar as it pertains to that conviction.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17-116.05:2(D).

A Copy,
Teste: /s/ Cynthia L. McCoy
Acting Clerk

RECEIVED MAY 6 1996

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of May 1996.

Arminta S. Lowery,
Appellant,

against Record No. 960134
Court of Appeals No. 1544-95-2

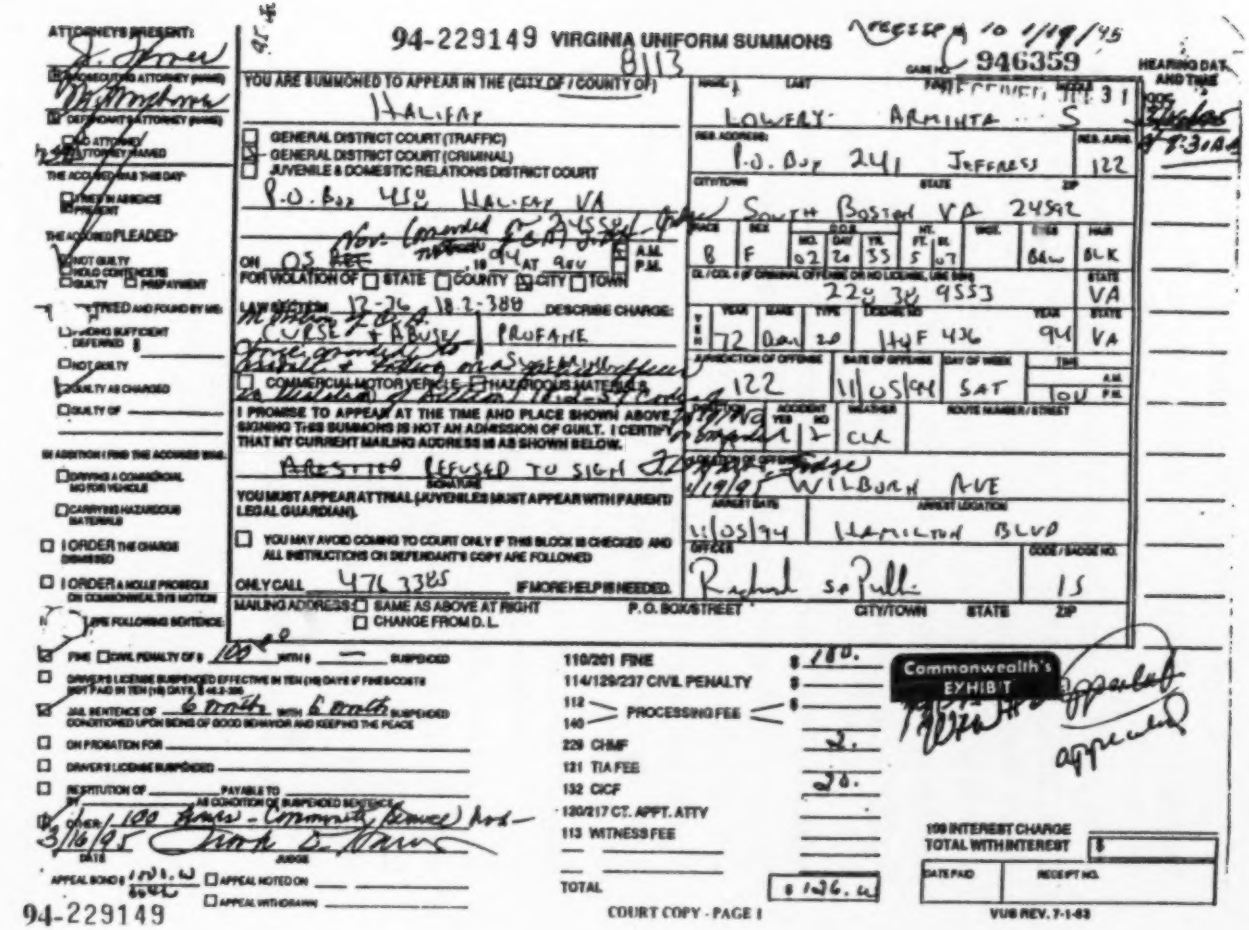
Commonwealth of Virginia,
Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Justice Koontz took no part in the consideration of this case.

A Copy,
Teste:
David B. Beach, Clerk
By: /s/
Deputy Clerk



94-229149 VIRGINIA UNIFORM SUMMONS

C 946359

YOU ARE SUMMONED TO APPEAR IN THE (CITY OF / COUNTY OF) HALIFAX

☐ GENERAL DISTRICT COURT (TRAFFIC)
☒ GENERAL DISTRICT COURT (CRIMINAL)
☐ JUVENILE & DOMESTIC RELATIONS DISTRICT COURT

P.O. Box 450 HALIFAX VA

ON 03 DEC 19 94 AT 9AM ☐ A.M. ☐ P.M.

FOR VIOLATION OF ☐ STATE ☐ COUNTY ☒ CITY ☐ TOWN

LAW SECTION 17-26 18.2-388 DESCRIBE CHARGE: CURSE & ABUSE | PROFANE

☐ COMMERCIAL MOTOR VEHICLE ☐ HAZARDOUS MATERIALS

I PROMISE TO APPEAR AT THE TIME AND PLACE SHOWN ABOVE. SIGNING THIS SUMMONS IS NOT AN ADMISSION OF GUILT. I CERTIFY THAT MY CURRENT MAILING ADDRESS IS AS SHOWN BELOW.

ARRESTED REFUSED TO SIGN
SIGNATURE

YOU MUST APPEAR AT TRIAL (JUVENILES MUST APPEAR WITH PARENT/LEGAL GUARDIAN).

☐ YOU MAY AVOID COMING TO COURT ONLY IF THIS BLOCK IS CHECKED AND ALL INSTRUCTIONS ON DEFENDANT'S COPY ARE FOLLOWED

ONLY CALL 476 3385 IF MORE HELP IS NEEDED.

MAILING ADDRESS: ☐ SAME AS ABOVE AT RIGHT ☐ CHANGE FROM D.L.

P.O. BOX/STREET CITY/TOWN STATE ZIP

LAST: LOWERY FIRST: ARMINTA MIDDLE: S

RES. ADDRESS: P.O. Box 241 RES. APT. NO.: 122

CITY/TOWN: South Boston STATE: VA ZIP: 24592

RACE: B SEX: F HGT: 5'07 WGT: 84# EYES: BLK HAIR: BLK

DL/COL # (IF CRIMINAL OFFENSE OR NO LICENSE, USE SSN): 229 34 9553 STATE: VA

VEH: YEAR 92 MAKE Dodg TYPE 2D LICENSE NO. 1HJF426 YEAR 94 STATE VA

JURISDICTION OF OFFENSE: 122 DATE OF OFFENSE: 11/05/94 DAY OF WEEK: SAT TIME: ON A.M. P.M.

DIRECTION: Eastbound ACCIDENT: YES NO WEATHER: CLR ROUTE NUMBER/STREET:

LOCATION OF OFFENSE: 11/19/95 WILBURN AVE

ARREST DATE: 11/05/94 ARREST LOCATION: HAMILTON BLVD

OFFICER: Raphael Sa Pull. CODE/BADGE NO.: 15

ATTORNEY'S PRESENT:
COMMONWEALTH'S ATTORNEY (NAME):
DEFENDANT'S ATTORNEY (NAME):
☐ NO ATTORNEY / ☐ ATTORNEY WAIVED

THE ACCUSED THIS DAY:
☐ FAILED TO APPEAR IN ABSENCE WITH CONSENT

THE ACCUSED PLEADED:
☐ NOT GUILTY
☐ NOLO CONTENDERE
☐ GUILTY ☐ PREPAYMENT

☐ TRIED AND FOUND BY MC
☐ PLEADING INSUFFICIENT DEFERRED $ ____
☐ NOT GUILTY
☐ GUILTY AS CHARGED
☐ GUILTY OF ____

IN ADDITION I FIND THE ACCUSED WAS:
☐ DRIVING A COMMERCIAL MOTOR VEHICLE
☐ CARRYING HAZARDOUS MATERIALS

☐ I ORDER THE CHARGE DISMISSED
☐ I ORDER A NOLLE PROSEQUI ON COMMONWEALTH'S MOTION
☐ THE FOLLOWING SENTENCE:

☒ FINE ☐ CIVIL PENALTY OF $ 180.00 WITH $ ____ SUSPENDED
☐ DRIVER'S LICENSE SUSPENDED EFFECTIVE IN TEN (10) DAYS IF FINE/COSTS NOT PAID IN TEN (10) DAYS, § 46.2-395
☒ JAIL SENTENCE OF 6 month WITH 6 month SUSPENDED CONDITIONED UPON BEING OF GOOD BEHAVIOR AND KEEPING THE PEACE
☐ ON PROBATION FOR ____
☐ DRIVER'S LICENSE SUSPENDED ____
☐ RESTITUTION OF ____ PAYABLE TO ____
☒ OTHER AS CONDITION OF SUSPENDED SENTENCE: 100 Hours - Community Service Work
3/16/95 DATE
Frank D. Hall JUDGE

APPEAL BOND $ 1,000.00 ☐ APPEAL NOTED ON ____
☐ APPEAL WITHDRAWN ____

94-229149

110/201 FINE	$ 180.
114/129/237 CIVIL PENALTY	$
112 / 140 PROCESSING FEE	$
229 CHMF	2.
121 TIA FEE	
132 CICF	20.
120/217 CT. APPT. ATTY	
113 WITNESS FEE	
TOTAL	$ 126.00

COURT COPY - PAGE 1

Commonwealth's EXHIBIT

199 INTEREST CHARGE
TOTAL WITH INTEREST $

DATE PAID | RECEIPT NO.

VUB REV. 7-1-93

A-4

BEST AVA

LABLE COPY

RECEIVED JUL 3 1 1995

☒ Motion to Change Bond on: .....
☐ changed to $ .....
☐ no change

The Accused was this day:
☐ tried in absence
☐ present

Attorneys Present:
J. Turner
M. Boettner
☐ NO ATTORNEY
☒ ATTORNEY WAIVED

The Accused PLEADED:
☒ not guilty
☐ nolo contendere
☐ guilty

And was TRIED and FOUND by me:
☐ not guilty
☒ guilty as charged
☐ guilty of .....
☐ facts sufficient to find guilt but defer adjudication/ disposition and place accused on first time offender probation, §§ 18.2-251 or 19.2-303.2

And was FOUND by me to be:
☐ driving a commercial motor vehicle
☐ carrying hazardous materials

☐ I ORDER the charge dismissed
☐ I ORDER a nolle prosequi on Commonwealth's motion

☐ I ORDER the charge dismissed:
☐ conditioned upon payment of costs (accord and satisfaction) § 19.2-151
☐ conditioned upon payment of costs and successful completion of traffic school § 14.1-123

3/16/95
DATE

☒ I impose the following Sentence:
☐ FINE of $ ..... with $ ..... suspended;
☐ JAIL sentence of ..... imposed with ..... suspended conditioned upon being of good behavior and keeping the peace.
☐ Serve jail sentence on weekend beginning .....
☐ Work release authorized if eligible
☐ Work release required
☐ on PROBATION for .....
☐ DRIVER'S LICENSE suspended for a period of 6 months.
☐ Referred to VASAP
☐ Referred to CDI
☐ RESTITUTION of $ .....
due by .....
Payable to .....
☐ as condition of suspended sentence, ... hours of community service to be performed for .....
☐ in addition to other sentence provisions
☐ to be credited against fines and cost at $ ..... /hr.
☐ Contact prohibited between defendant and victim/ victim's spouse and children pursuant to Va. Code § 18.2-60.3.
☐ Bond: $ .....
☐ Other: .....

Bail on Appeal $ 1000. w/bond
☐ appeal noted on .....
☐ Remanded for CCRE Report

Frank D. Harris
JUDGE

FINE	$
COSTS	
112 / 140 PROCESSING FEE	$ 22. / 2.
113 WITNESS FEE	
120 CT. APPT. ATTY.	
125 WEIGHING FEE	
132 CICF	20.
133 BLOOD TEST FEE	
229 CHMF	2.
OTHER (SPECIFY):	
	$
TOTAL	$ 46.00
109 INTEREST CHARGE	
TOTAL WITH INTEREST CHARGE	$

DATE PAID	RECEIPT NO

$ ..... discharged by ..... hours of community service (documentation attached)

A-5